

No. 83877

**IN THE
MISSOURI SUPREME COURT**

TYRONE L. HILL,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

**Appeal from the Circuit Court of Jackson County, Missouri
The Honorable William W. Ely, Judge**

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from the denial of a Supreme Court Rule 29.15 Motion to Vacate, Set Aside or Correct Judgment or Sentence, without an evidentiary hearing, in the Circuit Court of Jackson County, Missouri, the Honorable William W. Ely, presiding. The convictions sought to be vacated were for two counts of robbery in the first degree, §569.020, RSMo 2000, two counts of armed criminal action, §571.015, RSMo 2000, one count of possession of a short-barreled shotgun, §571.020, RSMo 2000, and one count of first degree tampering, §569.080, RSMo 1994, for which the sentences were consecutive terms of thirty years and twenty five years for the two counts of robbery, concurrent terms of ten years for each count of armed criminal action, seven years for possession of a short-barreled shotgun, and six years for tampering in the custody of the Missouri Department of Corrections. The Court of Appeals, Western District, affirmed appellant's convictions and sentences in Hill v. State, WD58951, memorandum order, (Mo.App. W.D. June 5, 2001). This Court has jurisdiction as it sustained appellant's application for transfer pursuant to Supreme Court Rule 83.04. Article V, § 10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

The facts adduced at trial as found by the Western District Court of Appeals in State v. Hill, 970 S.W.2d 868 (Mo. App. W.D. 1998), are as follows:

On November 14, 1996, the defendant, Tyrone Hill, was convicted after a jury trial in the circuit court of Jackson County of two counts of robbery in the first degree, § 569.020, two counts of armed criminal action, § 571.015.1, possession of a short barreled shotgun, § 571.020.1(4), and tampering in the first degree, § 569.080.1. The defendant was sentenced to consecutive terms of 30 and 25 years imprisonment on each of the robbery convictions, and to terms of 10 years imprisonment for each of the armed criminal action convictions, and six and seven years respectively for possession of a short barreled shotgun and tampering in the first degree, the sentences to run concurrently with the other convictions.

* * * * *

On May 16, 1996, the Dollar General Store at 6141 Blue Ridge Boulevard in Raytown, Missouri, was robbed. The defendant approached Joyce Nead, a cashier on duty, holding a paper bag, and told her to give him the money from the register. He pointed to something underneath his coat, which she believed to be a gun. She began to panic and could not open her register. During this exchange, a customer, Judy George, walked up to the register with a \$ 20 dollar bill in her hand. As she neared the register, she heard Ms. Nead tell the

defendant, "I'm trying to get it open." The defendant grabbed Ms. George by the right shoulder, put a gun to her neck, and told Ms. Nead to hurry up or he would "blow her neck off." He also took Ms. George's \$ 20.

Ms. Nead was unable to open her register, so she called her manager, John Miller. As Mr. Miller was approaching the front of the store, he saw the defendant holding the gun. The defendant pointed the gun at him, and told him to open the drawer or he would kill him. Miller tried to open the register but it had run out of "detail tape" which caused the register to automatically close. During this entire time, the defendant repeatedly made statements to, "Open up the register or I'll kill you" and, "Give me the money or I'll kill the customer." Mr. Miller went to the next register and pulled out the cash drawer. The defendant took approximately \$ 130 dollars from the drawer and placed the money in his pocket.

Officer Gregory Smith, of the Raytown Police Department, was driving by the store when he received a radio dispatch that a robbery had just occurred at the store. Officer Smith pulled his vehicle up to the store just as a man, who matched the description of the robbery suspect and who was later identified as the defendant, was exiting the store.

When the defendant saw Smith's patrol car, he started to run. He went through a parking lot and then "cut through" a beauty shop. Smith decided not to follow him into the shop because he thought the defendant was armed. He

radioed Officer Rick Strack and told him that the defendant had entered a fenced, wooded area. Strack apprehended the defendant there. The defendant was not wearing a shirt at the time of his arrest. He was searched and the police recovered a .20 gauge shotgun shell and \$ 149 dollars. The money was bundled exactly the way that the Dollar General Store packaged its cash. Police Chief Christopher Turnbow recovered a paper sack and a crumpled white T-shirt next to a shed in the yard from which the defendant had run. Officer Kevin Sheets found a green pullover shirt which was wrapped around a sawed-off shotgun in a bush near the scene of the robbery. The barrel of the gun measured slightly over 15 3/4 inches.

Meanwhile, in a nearby parking lot, police also found an automobile with its right rear window broken out. This car was later determined to be stolen. Inside the car, the police found a blood-stained paper towel, a screwdriver and a cassette with rap music. Pat Sanchez, the owner of the vehicle said the car had been stolen earlier that day. She stated that the towel, screwdriver, and tape were not her's. The latent fingerprints taken from the trunk of the car matched the defendant's.

The defendant told inconsistent stories. At trial, he testified that he was going to Pizza Hut and took a shortcut through the parking lot which took him past the automobile. He said that is where he found the shotgun shell and that he had picked it up for good luck. In addition, he testified that he patted the trunk

lid of the car to make sure it didn't have an alarm and then decided to look around in it and find "something else [to steal]." He said that as he was getting out of the vehicle, the police arrived, so he attempted to run, but stopped when the police officer drew his gun. The defendant testified that the \$149 found in his pocket was his to take care of some unpaid traffic tickets.

When asked if it wasn't an "astounding coincidence" that the money was bundled in the "exact same way" the Dollar General Store bundled its money, he answered, "Very."

State v. Hill, 970 S.W.2d 868-870 (Mo. App. W.D. 1998).

Following the Court of Appeals affirming appellant's convictions and sentences, appellant filed a pro-se motion for post-conviction relief and an amended motion for post-conviction relief (PCR L.F. 1-8, 14). The motion court denied appellant's motion, without an evidentiary hearing, on July 19, 2000 (PCR L.F. 28-34).

The Missouri Court of Appeals affirmed the motion court's findings holding that appellant's substantive claim was addressed on direct appeal under the plain error standard where the omission of the element of "knowing" from the verdict director had "no practical effect." Hill v. State, WD58951, memorandum order at 7 (Mo.App. W.D. June 5, 2001). This finding foreclosed a finding of prejudice under the Strickland prejudice test. Id.

This Court granted appellant's application for transfer on September 25, 2001.

POINT RELIED ON

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING, WITHOUT AN EVIDENTIARY HEARING, APPELLANT'S CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE VERDICT DIRECTOR FOR POSSESSION OF A SHORT-BARRELED SHOTGUN WHICH FAILED TO INCLUDE THE ELEMENT OF "KNOWING" BECAUSE APPELLANT'S CLAIM IS FORECLOSED FROM BEING RELITIGATED UNDER THE GUISE OF INEFFECTIVE ASSISTANCE OF COUNSEL IN THAT APPELLANT LITIGATED THIS CLAIM ON DIRECT APPEAL. IN ANY EVENT, APPELLANT CANNOT ESTABLISH THAT HE WAS PREJUDICED BECAUSE "KNOWING" WAS NOT A DISPUTED ELEMENT OF THE CHARGES.

Hill v. State, WD58951, memorandum order (Mo.App. W.D. June 5, 2001);

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984);

O'Neal v. State, 766 S.W.2d 91 (Mo. banc 1989);

Sidebottom v. State, 781 S.W.2d 791 (Mo. banc 1989);

Supreme Court Rule 30.20.

ARGUMENT

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING, WITHOUT AN EVIDENTIARY HEARING, APPELLANT’S CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE VERDICT DIRECTOR FOR POSSESSION OF A SHORT-BARRELED SHOTGUN WHICH FAILED TO INCLUDE THE ELEMENT OF “KNOWING” BECAUSE APPELLANT’S CLAIM IS FORECLOSED FROM BEING RELITIGATED UNDER THE GUISE OF INEFFECTIVE ASSISTANCE OF COUNSEL IN THAT APPELLANT LITIGATED THIS CLAIM ON DIRECT APPEAL. IN ANY EVENT, APPELLANT CANNOT ESTABLISH THAT HE WAS PREJUDICED BECAUSE “KNOWING” WAS NOT A DISPUTED ELEMENT OF THE CHARGES.

Appellant claims that the motion court was clearly erroneous in denying, without an evidentiary hearing, his claim that his trial counsel was ineffective for failing to object to the verdict director for the charge of possession of a short-barreled shotgun which failed to include the element of “knowing” because “knowing” was a necessary element of the crime and if trial would have objected to this instruction, the result of the trial would have been different (App. Br. 7). Appellant also challenges the motion court’s findings that the issue was addressed on direct appeal where the Court of Appeals found no plain error and that the omission had “no practical effect” and that this finding precludes a finding of Strickland prejudice (App. Br. 7).

As will be discussed below, appellant’s claim must fail because 1) appellant cannot relitigate a claim raised on direct appeal under the guise of ineffective assistance of counsel;

and 2) appellant has failed to show that he was prejudiced by counsel's failure to object to the verdict director because the finding of the Court of Appeals already found on direct appeal that the omission of the element of "knowing" had "no practical effect" on the jury's determination at guilt because this element was not disputed at trial.

Relevant Facts

Appellant's motion for post-conviction relief alleged, in relevant part:

Mr. Hill was denied his rights to effective assistance of counsel, as well as his rights to equal protection and due process of law, guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10 and 18(a) of the Missouri Constitution, and stated in Sanders v. State, 738 S.W.2d 856, 857-858 (Mo. banc 1987) and Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984), for reasons that include, but are not limited to, the fact that Mr. Hill's trial counsel, Arthur Tejeda, failed to exercise the customary skill and diligence that a reasonable competent attorney would exercise under similar circumstances, and as a result, Mr. Hill was prejudiced. Specifically, Mr. Hill's trial counsel failed to make a specific, timely objection to the submission of the instruction for the offense of possession of a short-barreled shotgun. The instruction submitted to the jury omitted the term "knowingly" in describing the mental state necessary for conviction. Trial counsel's failure to object to the instruction as submitted resulted in prejudice to Mr. Hill because the jury was

not required to find that he committed each material element of the charged crime knowingly, and because the failure to object resulted in waiver of the issue on Mr. Hill's direct appeal, where the Court of Appeals only reviewed the issue for plain error;

(PCR L.F. 17).

In denying appellant's motion, without an evidentiary hearing, the motion court found, in relevant part, that:

The allegation raised by Movant in Paragraph Number 8, subpart a, of his Amended Motion, is that trial counsel was ineffective for failure to object to the submission of a jury instruction on possession of a short-barreled shotgun which omitted the mental state "knowingly." The Movant raised this substantive issue on direct appeal to the Missouri Court of Appeals, Western District. In an Opinion filed June 16, 1998, Appeal No. WD 54102, the Court of Appeals affirmed the Movant's convictions and denied his appeal on this and all other points. This claim must fail. The Supreme Court held in State v. Ervin, 835 S.W.2d 905 at 932 (Mo. banc 1992) that they will not re-examine an issue on the theory of ineffective assistance of counsel after the substantive issue has been decided against the defendant. Since the Missouri Court of Appeals has already decided this substantive issue on direct appeal, accordingly, this Point should be, and is hereby, denied;

(PCR L.F. 31-32).

In affirming the motion court's findings, the Missouri Court of Appeals held that because appellant's substantive claim was addressed on direct appeal and the Appeals Court found that there was no manifest injustice or "practical effect" from the omission of the element of "knowingly" from the verdict-directing instruction, this served to establish a finding of no prejudice under the Strickland prejudice test. Hill v. State, WD58951, memorandum order at 7 (Mo.App. W.D. June 5, 2001).

Standard of Review

This Court's review of the denial of post-conviction relief is limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous. State v. Ervin, 835 S.W.2d 905, 928 (Mo. banc 1992), cert. denied, 507 U.S. 954 (1993). The trial court's findings are clearly erroneous if, after a review of the entire record, the appellate court is left with the definite and firm impression that a mistake has been made. Id.

In order to be entitled to an evidentiary hearing, a movant must 1) cite facts, not conclusions, which, if true, would entitle movant to relief; 2) the factual allegations must not be refuted by the record; and 3) the matters complained of must prejudice the movant. State v. Blankenship, 830 S.W.2d 1, 16 (Mo. banc 1993).

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or a death sentence has two components. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). "First, the defendant must show that counsel's performance was deficient." Id., 466 U.S. at 687. "Second, the defendant must show that the deficient performance prejudiced the defense." Id. at 687. In order to show

prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. 466 U.S. at 694.

A movant must show that the fact finder at trial would have had a reasonable doubt as to his guilt absent the alleged error. State v. Broseman, 947 S.W.2d 520, 525 (Mo. App. W.D. 1997). Moreover, the determining factor in judging ineffectiveness is whether counsel’s conduct so undermined the proper functioning of the trial and adversarial process that the verdict cannot be held to be the just result. Id.

Foreclosure of relitigation of substantive issue

In the case at bar, the motion court’s findings are not clearly erroneous. It has long been held by the Courts of this State that an appellant cannot relitigate an issue decided on direct appeal under the guise of ineffective assistance of counsel. O’Neal v. State, 766 S.W.2d 91, 92-93 (Mo. banc 1989); State v. Davis, 936 S.W.2d 838, 842 (Mo.App. W.D. 1996); State v. Burnett, 931 S.W.2d 871, 875 (Mo.App. W.D. 1996); State v. Clark, 913 S.W.2d 399, 406 (Mo.App. W.D. 1996); State v. Anderson, 862 S.W.2d 425, 437 (Mo.App. E.D. 1983); State v. Suter, 931 S.W.2d 856 (Mo.App. W.D. 1996); Leisure v. State, 828 S.W.2d 872 (Mo. banc 1992), cert. denied, 506 U.S. 923 (1992); Amrine v. State, 785 S.W.2d 531 (Mo. banc 1990), cert. denied, 498 U.S. 881 (1990); Roberts v. State, 775 S.W.2d 92, 94 (Mo. banc 1989), cert. denied, 494 U.S. 1039 (1990). This limitation exists because “if issues, apparently finally decided, may be reopened and reviewed simply because a litigant has an additional citation to offer or a different theory to suggest there would never be an end to litigation.” Gailes v. State,

454 S.W.2d 561, 564 (Mo. 1970). The relitigation of these issues would result in a loss of precious judicial resources. Moreover, this Court has stated that “[w]e will not permit motion counsel to convert unpreserved error into viable error by arguing incompetence. Defendants may be held to the consequences of counsel’s failure to object, whether the failure is the result of a strategic decision, or is due to inadvertence.” Jones v. State, 784 S.W.2d 789, 793 (Mo. banc 1990), cert. denied, 498 U.S. 881 (1990).

The motion court’s findings were not clearly erroneous. The Court of Appeals decided this issue on direct appeal by finding that there was “no practical effect” from the omission of “knowing” from the verdict director as it was not a disputed element. Appellant has merely changed the theory of the error to ineffective assistance of counsel. As stated above, appellant cannot relitigate an issue that was decided on direct appeal under the guise of ineffective assistance of counsel. Appellant’s claim must fail.

Appellant claims that the motion court’s findings are erroneous because the standard of Strickland prejudice is different than that of plain error on direct appeal and therefore, the mere fact that the Missouri Court of Appeals determined that the omission of the element of “knowing” from the verdict director was not plain error did not foreclose a finding of Strickland prejudice in a post-conviction proceeding (App. Br. 12). However, appellant ignores that, as discussed above, his claim is foreclosed from being relitigated under a different theory. Appellant also neglects to mention that not only did the Court of Appeals find that there was no plain error from the omission, but also, the Court of Appeals found that there was “no practical effect” from the omission as it was not a disputed element.

As to appellant's claim that the standards for plain error and Strickland prejudice are not the same, the minor difference in the standards does not undermine the courts long-time policy that claims cannot be relitigated under a different theory. The Courts of the State of Missouri have long held that a finding of no plain error on direct appeal forecloses a finding of Strickland prejudice in the post-conviction setting. Clemmons v. State, 785 S.W.2d 524 (Mo. banc 1990), cert. denied, 498 U.S. 882 (1990) (Held that appellant could not relitigate claims raised on direct appeal under the guise of ineffective assistance of counsel and relying on Sidebottom v. State, 781 S.W.2d 791 (Mo. banc 1989), held that this Court's finding of no plain error on direct appeal served to find no Strickland prejudice); State v. Davis, 936 S.W.2d 838 (Mo. App. W.D. 1996); State v. Suter, 931 S.W.2d 856 (Mo. App. W.D. 1996); State v. Clark, 913 S.W.2d 399, 406 (Mo. App. W.D. 1996); State v. Chapman, 936 S.W.2d 135, 141-142 (Mo. App. E.D. 1996); State v. Leady, 879 S.W.2d 644, 649 (Mo. App. W.D. 1994); State v. Anderson, 862 S.W.2d 425, 437 (Mo. App. E.D. 1993); Haynes v. State, 825 S.W.2d 633, 635 (Mo. App. E.D. 1992).

In determining Strickland prejudice, the question is "whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." Strickland v. Washington, 466 U.S. 688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Plain error, on the other hand, results when the court finds that a "manifest injustice or miscarriage of justice has resulted" from the error. Supreme Court Rule 30.20. However,

“miscarriage of justice or manifest injustice” does not appear to have a definite meaning.

“Manifest injustice or miscarriage of justice” is not an easy phrase to define. Indeed the cases give the distinct impression that ‘plain error’ is a concept appellate courts find impossible to define, save they know it when they see it.” 3A Charles Alan Wright, Federal Practice and Procedure, §856 (1982).

“Whether an appellate court should take notice of an error not raised below must be made on the facts of the particular case, and there are no ‘hard and fast classifications in either the application of the principle or the use of a descriptive title.’”

State v. Doolittle, 896 S.W.2d 27, 29 (Mo. banc 1995); see also State v. Cline, 808 S.W.2d 822, 824 (Mo. banc 1991) (“The determination whether plain error exists must be based on a consideration of the facts and circumstances of each case”).

Although it appears that manifest injustice does not have an exact definition, the appellate courts have determined that in the context of instructional error, manifest injustice results when the trial court so misdirected or failed to instruct the jury that it is apparent that the instructional error affected the verdict. State v. Deck, 994 S.W.2d 527, 540 (Mo. banc 1999), cert. denied, 526 U.S. 1136 (1999); Doolittle, supra, at 29.

The case law, as discussed above, indicates that there is an inconsistency between whether Strickland prejudice is equivalent to plain error or manifest injustice. Although the appellate courts of this State have stated that a finding of no plain error on direct appeal forecloses a finding of Strickland prejudice in a post-conviction proceeding, the appellate

courts have also stated that the standards are different. Where Strickland prejudice discusses the “reasonable probability” that the outcome would be different absent the error, manifest injustice, at least in the instructional error context, indicates that the error must have had a decisive effect on the jury’s determination of guilt. Plain error places a heavier burden on the defendant. The defendant must show that the instructional error had a decisive effect on the jury’s verdict. In a post-conviction proceeding, the movant only must show Strickland prejudice, or in other words, that there is a reasonable probability that the result would have been different. The United States Supreme Court, in Strickland, supra, 466 U.S. at 697, stated that “[w]ith regard to the prejudice inquiry, only the strict outcome-determinative test, among the standards articulated in the lower courts, imposes a heavier burden on defendants than the tests laid down today. The difference, however, should alter the merit of an ineffectiveness claim only in the rarest case.”

Therefore, although the plain error standard, a seemingly outcome-determinative test, places a higher burden on defendants than establishing Strickland prejudice, the difference does not necessarily alter the analysis of a claim of ineffective assistance of counsel. Indeed, in many cases, the analysis will remain the same. For example, this Court in Sidebottom v. State, 781 S.W.2d 791, 796 (Mo. banc 1989), in determining whether prejudice resulted from trial counsel’s alleged failure to object to the introduction of the defendant’s prisoner data sheet at trial, an issue substantively decided on direct appeal under the plain error standard, recognized that “on the facts of the present case and the law as applied to them, the bases for the Court’s finding of no manifest injustice on direct appeal serve now to establish a finding

of no prejudice under the Strickland test.” This Court found that the reasoning applied in determining whether plain error resulted from the introduction of the data sheet, also established that there was not a “reasonable probability” that the result would have been different had counsel objected. Sidebottom, supra, at 797.

The same applies to the case at bar. On direct appeal, the Court of Appeals found that:

Here, the defense was not that the defendant unknowingly possessed the shotgun, but rather a case of mistaken identity, thus, there is no practical effect because “knowingly” was omitted from the instruction.

State v. Hill, 970 S.W.2d 868, 872 (Mo.App. W.D. 1998).

The Court of Appeals’ reasoning in establishing that the omitted element did not establish plain error, also establishes no Strickland prejudice. There was “no practical effect” from the omission of the element of “knowingly” from the verdict directing instruction for possession of a short barreled shotgun because this was not a disputed element of the crime. The result of the trial would not have been different. The state’s evidence at trial showed that appellant concealed the sawed-off shotgun under his coat and used it to commit a holdup at a Raytown store. Id. at 872. Appellant’s defense was not that he had “unknowingly” possessed the shotgun, but rather that his arrest was a case of mistaken identity, and that he was simply taking a shortcut through a church parking lot to a Pizza Hut restaurant when he was apprehended by police. Id. It was clear that the robber, whomever he might have been, knowingly possessed the sawed-off shotgun. The omission of the word “knowingly” from the

instruction had “no practical effect” and the failure to object to the instruction did not prejudice appellant. State v. Anderson, 951 S.W.2d 710, 711-712 (Mo.App. E.D. 1997) (Convictions for delivery of a controlled substance affirmed even though the verdict directors did not require a finding that the defendant knew that the drug he was delivering was methamphetamine because actual knowledge was “not a contested factual issue”); State v. Wright, 30 S.W.3d 906, 912 (Mo. App. E.D. 2000) (holding that where defendant does not dispute the mental state of “knowing” but rather disputes whether the crime happened at all, it was not error to fail to instruct on the mental state); State v. Wurtzberger, 40 S.W.3d 893, 898 (Mo. banc 2001). In the case at bar, the finding of no plain error on direct appeal foreclosed a finding of Strickland prejudice in the context of ineffective assistance of counsel.

Conclusion

Although the appellate courts’ findings that plain error forecloses a finding of Strickland prejudice is inconsistent with the standards for plain error and Strickland prejudice, the policy that litigants cannot raise the same issue on direct appeal and again in a post-conviction proceeding under the guise of ineffective assistance of counsel remains valid. In the interest of judicial economy, appellants may not continue to raise the same issue by merely changing the theory in a subsequent proceeding. Once an issue has been decided, defendants should not be able to continue to raise the same claim by merely cloaking the claim in another theory.

Appellant was not entitled to an evidentiary hearing on his claim that trial counsel was ineffective for failing to object to the verdict directing instruction which failed to include the

element of “knowingly”. Appellant had already raised this substantive claim on direct appeal and the Court of Appeals reasoning that the omission did not have any “practical effect” on the jury’s determination forecloses a finding of Strickland prejudice. The motion court was not clearly erroneous in denying appellant’s claim.

Based on the foregoing, appellant’s point must fail.

CONCLUSION

In view of the foregoing, the respondent submits that the denial of appellant's post-conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) of this Court and contains _____ words, excluding the cover, this certification and the appendix, as determined by WordPerfect 6 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ____ day of December, 2001.

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RESPONDENT'S APPENDIX
